

BEFORE THE
RESPIRATORY CARE BOARD
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

ERIC CLIFTON BROWN, R.C.P.
2920 33rd Street
Sacramento, California 95817

Respiratory Care Practitioner
License No. 9108

Respondent.

Case No. R-1987

OAH No. N-2005090024

PROPOSED DECISION

Administrative Law Judge Stephen J. Smith, Office of Administrative Hearings, State of California heard this matter in Sacramento, California on November 15, 2005.

David Carr, Deputy Attorney General, Department of Justice, represented the Respiratory Care Board.

Eric Clifton Brown represented himself.

The matter was submitted on November 15, 2005.

FACTUAL FINDINGS

1. Stephanie Nunez made the charges and allegations contained in the Accusation in her official capacity as Executive Officer, Respiratory Care Board (Board), Department of Consumer Affairs, State of California. The Accusation was filed with the Board on July 26, 2005. The Board has jurisdiction to revoke, suspend or otherwise impose disciplinary action upon any respiratory care practitioner in the State of California, provided cause for such action is proved by clear and convincing evidence.¹

¹ Business and Professions Code section 3750, *Ettinger v. Medical Board of California* (1982) 135 Cal.App.3d 835, 842.

2. Eric Clifton Brown, R.C.P., timely filed a Notice of Defense to the Accusation. The matter was set for an evidentiary hearing before an Administrative Law Judge of the Office of Administrative Hearings.

3. The Board issued Mr. Brown Respiratory Care Practitioner (RCP) license number 9108 on August 16, 1985. Mr. Brown has been licensed by the National Board of Respiratory Care Practitioners (the National Board) since 1972, well before the founding of the California Board. When the California Board was created by the Legislature, he was “grandfathered” in as an original licensee. Mr. Brown’s California Board license is currently in full force and effect.

4. Mr. Brown is also licensed as a RCP in Massachusetts, Illinois and Oregon. The present status of these licenses was not proved.

5. The Board issued a Public Reprimand to Mr. Brown effective February 4, 2004, pursuant to a stipulation between Mr. Brown and the Board. Mr. Brown agreed that there was factual and legal cause for the disciplinary action for unprofessional conduct, in that he was convicted on December 13, 2001, of a misdemeanor violation of Vehicle Code section 23152, subdivision (b), driving with a blood alcohol level of .08 per cent by volume or higher.

6. Mr. Brown was convicted in absentia upon his plea of no contest on November 2, 2004, in the Superior Court, County of Sacramento, of a misdemeanor violation of Penal Code section 647, subdivision (a), committing a lewd and dissolute act in a public place. Mr. Brown was sentenced to serve three years on informal probation, the terms and conditions of which included payment of a fine, 10 days in the County jail, and an order to stay away from all County parks. The jail time was later converted to 60 hours of community service, to be served within six months. Mr. Brown was also evaluated for the District Attorney’s Diversion Program.

7. Mr. Brown filed a motion with the sentencing court pursuant to Penal Code section 1203.4, subdivision (a), to expunge his conviction, on July 20, 2005. The Sacramento County Probation Department was ordered to conduct a review and report back to the court on August 17, 2005. The report had not been made as of the date of the evidentiary hearing, and no ruling has yet been made on the motion.

8. The facts leading to Mr. Brown’s conviction occurred on March 16, 2004. Mr. Brown was arrested in the public restroom at Miller Park by an undercover police officer for exposing himself to the undercover officer.

9. Mr. Brown explained in his evidentiary hearing testimony that he pled no contest to the charge because he was concerned that a felony conviction could jeopardize his license. He had no idea that a misdemeanor conviction could do so, and had never heard of the provisions of Education Code section 44010 before the evidentiary hearing. He expressed his displeasure that the Board had never, to his knowledge, advised licensees of

the provisions of this statute and its effect upon licensees. He disputed the validity of the conviction, claiming “something major was left out.” He testified he was reading in the park and had to use the restroom. When he walked in, another man was walking out, but did not leave. He noted he cannot urinate with someone watching. He did not take the explanation further in his testimony. He did not comment on the allegation in the Accusation that he admitted engaging in the conduct to the undercover police officer who witnessed the conduct and later arrested him.

10. Mr. Brown voluntarily checked himself into Haven House, a residential alcohol and drug treatment program and clean and sober living house, on February 2, 2003. He still lives at Haven House, where he is the assistant manager. He also voluntarily began seeing a psychiatrist, Dr. Quinn, at the end of April 2004. He continued seeing Dr. Quinn weekly for three months, then biweekly for the next two months, then monthly. He stopped seeing Dr. Quinn in October 2004, as the result of a “joint decision.” As part of his Haven House program, Mr. Brown attends Alcoholics Anonymous (AA) or Narcotics Anonymous (NA) meetings every day. He received counseling by the staff psychologist twice per week. He attends a weekly class on the disease process of substance abuse. He attends group counseling from Gates Recovery once per week.

11. Mr. Brown lives in a clean and sober environment and makes an effort each day to encourage others trying to maintain a clean and sober lifestyle working in the facility’s program. He has recognized as a part of his therapy and participation in the Haven House program that he has had a “lifelong” problem with substance abuse. He is now convinced that if the major changes he has made in his life and thinking produced by the program at Haven House had already been in place, the conduct that led to his conviction would never have occurred. He acknowledged that he learned there is a correlation between his substance abuse problem and the conduct that resulted in the conviction. He acknowledged he made “lifestyle choices” that he is ashamed of today.

11. Mr. Brown has serious health problems that have limited his ability to work in the recent past and presently. He suffers from asthma and emphysema to the extent that a cold or influenza become life-threatening illnesses, due to his breathing problems. He also has a hernia that he is trying to “get corrected without surgery.” Mr. Brown now only works for Per Diem Registry, Concord, California. He has worked for this registry “off and on” for the last 25 years. He works two or three days per week for Per Diem. He noted that he believes it to be unfair to coworkers for him to join a hospital staff, because he often must miss work for health reasons, which shifts his share of the work to others. With a registry, he is free to decline any assignment if he is not able to work, without adverse consequences to peers.

12. Mr. Brown pointed out that his conviction has nothing to do with clinical behavior or his skills as a practitioner and did not affect any patient. He has never been a danger to any patient and there is no evidence that Mr. Brown has ever engaged in any conduct that evidenced any lack of skill or competence in caring for patients.

13. Mr. Brown's presentation was a curious mix of denial and admission; frustration and resignation; and rehabilitation and reservation. Mr. Brown denied the factual basis of the conviction, admitted it and then expressed resentment and frustration toward his attorney and the Board for failing to advise him that the conviction could have serious consequences on his ability to continue practice as a licensed RCP. Although the factual and legal basis for the action relate solely to a criminal conviction involving an embarrassing moment of misconduct entirely unrelated to the actual practice of respiratory care, the "elephant in the room" is Mr. Brown's freely and frankly acknowledged long term problem with substance abuse. Yet he has also taken substantial and praiseworthy steps toward substantial rehabilitation, including admitting the existence of the problem and its deleterious effect upon his life. What is most impressive is that his rehabilitative efforts have been entirely self-initiated. Those efforts have been quite serious and comprehensive. He has obtained psychiatric help, residential treatment, group and individual counseling, lives in a clean and sober environment and attends support group meetings every day. He has made great strides toward controlling his substance abuse. Before the evidentiary hearing on the Accusation, the Board was entirely unaware of Mr. Brown's substance abuse problem, and of his rehabilitative efforts.

14. Evidence of the costs of investigation and enforcement of the action spent by the Board was introduced in the form of a declaration of the Attorney General Senior Legal Analyst, submitted pursuant to Business and Professions Code sections 3753.5 and 3753.7. The costs consist of a claim for the services of the Senior Legal Analyst totaling of \$2,405.75, for 54.25 hours of work. The sparse declaration makes conclusory statements that the services of the Senior Legal Analyst included evaluating, investigating and pleading the case, and preparing it for trial. There is no detailed billing memorandum attached to the declaration, itemizing the tasks performed and the hours spent for each of the tasks.

15. The costs are presumed reasonable pursuant to the language of the statute, but Mr. Brown challenged the costs claim as unreasonable and excessive. Mr. Brown pointed out that the case is uncomplicated, involves a single conviction and very little reading. Mr. Brown's contentions have merit. The declaration reflects a claim of approximately a week and a half of full-time work for a rather uncomplicated matter. There is no evidence of extensive research, document assembly or interviews of witnesses. The Board's case was entirely documentary, and no witnesses were called. There was no evidence a witness was even interviewed, including Mr. Brown. The costs claim is excessive under these circumstances. A reasonable amount for costs of investigation and enforcement, considering the nature and complexity of the case, is \$1,300.

LEGAL CONCLUSIONS

1. "The burden of proof in the administrative proceedings involving the revocation or suspension of a professional license is clear and convincing proof to a

reasonable certainty.”² “Clear and convincing evidence requires a finding of high probability. The evidence must be so clear as to leave no substantial doubt. It must be sufficiently strong to command the unhesitating assent of every reasonable mind.”³ The burden of clear and convincing evidence was applied to each allegation of the Accusation.

2. Business and Professions Code section 3750, provides, in pertinent part, as follows:

The board may order the denial, suspension, or revocation of, or the imposition of probationary conditions upon, a license issued under this chapter, for any of the following causes:

¶...¶

(d) Conviction of a crime that substantially relates to the qualifications, functions, or duties of a respiratory care practitioner. The record of conviction or a certified copy thereof shall be conclusive evidence of the conviction.

¶...¶

(g) Conviction of a violation of any of the provisions of this chapter or of any provision of Division 2 (commencing with Section 500), or violating, or attempting to violate, directly or indirectly, or assisting in or abetting the violation of, or conspiring to violate any provision or term of this chapter or of any provision of Division 2 (commencing with Section 500).

¶...¶

(j) The commission of any fraudulent, dishonest or corrupt act which is substantially related to the qualifications, functions or duties of a respiratory care practitioner.

3. Business and Professions Code section 3752 provides, in pertinent part:

A plea or verdict of guilty or a conviction following a plea of nolo contendere made to a charge of any offense which substantially relates to the qualifications, functions, or duties of a respiratory care practitioner is deemed to be a conviction within the meaning of this article. The board shall order the

² *Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal. App. 3d 835, 842, *James v. Board of Dental Examiners* (1985) 172 Cal. App. 3d 1096, 1105

³ *In Re David C.* (1984) 152 Cal.App. 3d 1189, 1208.

license suspended or revoked, or may decline to issue a license, when the time for appeal has elapsed, or the judgment of conviction has been affirmed on appeal or when an order granting probation is made suspending the imposition of sentence, irrespective of a subsequent order under Section 1203.4 of the Penal Code allowing the person to withdraw his or her plea of guilty and to enter a plea of not guilty, or setting aside the verdict of guilty, or dismissing the accusation, information, or indictment.

4. Business and Professions Code section 3752.6 provides:

For purposes of Division 1.5 (commencing with Section 475), and this chapter, a crime involving sexual misconduct or attempted sexual misconduct, whether or not with a patient, shall be considered a crime substantially related to the qualifications, functions, or duties of a respiratory care practitioner.

5. California Code of Regulations (CCR), title 16, section 1399.370, provides, in pertinent part:

For the purposes of denial, suspension, or revocation of a license, a crime or act shall be considered to be substantially related to the qualifications, functions or duties of a respiratory care practitioner, if it evidences present or potential unfitness of a licensee to perform the functions authorized by his or her license or in a manner inconsistent with the public health, safety, or welfare. Such crimes or acts include but are not limited to those involving the following:

(a) Violating or attempting to violate, directly or indirectly, or assisting or abetting the violation of or conspiring to violate any provision or tem of the Act.

¶...¶

(e) Conviction of a crime involving lewd conduct, prostitution or solicitation thereof, or pandering and/or indecent exposure, as defined by the Penal Code.

¶...¶

6. Mr. Brown has suffered a criminal conviction for sexual misconduct. Mr. Brown disputed the conviction to some extent in his presentation. Collateral attack on a

criminal conviction cannot be made in later administrative proceedings; evidence of the conviction is conclusive proof of the existence of the conviction.⁴ Mr. Brown also contended the conviction does not serve as a valid basis to impose discipline, as it has nothing to do with patient care and there is no evidence his patient care has ever been anything other than competent and skillful. Mr. Brown's contention has some merit. He is correct that there is no evidence his patient care has been other than excellent in the more than 30 years he has practiced as a RCP. But the Legislature and the Board have both determined that there is a significant enough relationship between respiratory care practice and sexual misconduct or attempted sexual misconduct, such as that engaged in by Mr. Brown, sufficient to be deemed substantially related to the qualifications, functions and duties of a RCP, even if there is no showing of actual patient harm or actual involvement with a patient. Therefore, Mr. Brown's conviction is substantially related to the qualifications, functions and duties of a RCP, within the meaning of section Business and Professions Code section 3752 and CCR, title 16, section 1399.370, subdivision (e), in that the conviction involved sexual misconduct and indecent exposure, within the meaning of section 3752.6. Legal cause therefore exists to revoke or suspend Mr. Brown's license as a RCP.

7. It was not proved that Mr. Brown's conduct was unprofessional conduct, within the meaning of section 3750, subdivision (g), in that it was not proved Mr. Brown's conduct was fraudulent, dishonest or a corrupt act. This statute does not encompass the type of conduct engaged in by Mr. Brown.

8. Business and Professions Code section 3752.7 provides, in pertinent part:

Notwithstanding Section 3750, any proposed decision or decision issued under this chapter in accordance with the procedures set forth in Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code, that contains any finding of fact that the licensee or registrant...has committed an act or been convicted of a sex offense as defined in Section 44010 of the Education Code, shall contain an order of revocation. The revocation shall not be stayed by the administrative law judge. For purposes of this section, the patient shall no longer be considered a patient of the respiratory care practitioner when the order for respiratory procedures is terminated, discontinued, or not renewed by the prescribing physician and surgeon.

9. Education Code section 44010 provides, in pertinent part:

⁴ *Matanky v. Board of Medical Examiners* (1978) 79 Cal.App.3d 293, 302, *Arneson v. Fox* (1980) 28 Cal. 3d 440, 449.

‘Sex offense,’ ... means any one or more of the offenses listed below:

(a) Any offense defined in ...subdivision (a) or (d) of Section 647 of the Penal Code.

¶...¶

10. The license revocation procedure is designed to protect the public, not to administer punishment to individual licensees.⁵ "The object of an administrative proceeding aimed at revoking a license is to protect the public, that is, to determine whether a licensee has exercised his privilege in derogation of the public interest, and to keep the regulated business clean and wholesome."⁶ The purpose of an administrative proceeding concerning the revocation or suspension of a license is not to punish the individual; the purpose is to protect the public from dishonest, immoral, disreputable or incompetent practitioners.⁷

11. Ordinarily, the determination of an appropriate penalty for the violations proved is a matter of weighing the gravity of the violations against any facts in mitigation or rehabilitation, and determining what is necessary to protect the public health, safety and welfare, based on that analysis. In this peculiar case, the discretion to make that determination and to work substantial justice under all the facts and circumstances has been completely removed by Legislative action.

12. Mr. Brown denounced the interaction of Business and Professions Code section 3752.7 and Education Code section 44010, subdivision (a) as depriving the Administrative Law Judge of the ability to weigh and decide each case on its merits. His contention that the statute deprives the Administrative Law Judge of the ability to do justice when the individual circumstances so merit it has considerable merit. The requirements of section 3752.7 make sense when considering convictions for forcible sexual relations with a minor (Penal Code section 288), forcible rape (Penal Code section 261), forcible sodomy (Penal Code section 289), or for any other sex crime where registration as a convicted sexual offender under Penal Code section 290 is required, but makes little sense here. The statutory scheme deprives the Administrative Law Judge of the ability to weigh the gravity of the violation, the circumstances in aggravation, any mitigation present, including Mr. Brown's long history of exemplary RCP practice and lack of criminal record, as well as the fact that the conduct that led to the conviction has never shown up in the workplace. Rehabilitation is also irrelevant, which in this instance, fails to give credit where substantial credit is due. Absent this statutory scheme, which the Administrative Law Judge has no authority to disregard, the individual facts and circumstances of this case call for a stayed revocation and a five year probation that supports and enhances Mr. Brown's already substantial substance abuse and sexual misconduct rehabilitation. There is no evidence that Mr. Brown presents

⁵ *Ettinger v. Board of Medical Quality*, supra, 135 Cal.App.3d at p. 856.

⁶ *Id.*, quoting *Small v. Smith* (1971) 16 Cal.App.3d 450, 457.

⁷ *Ettinger*, supra, at 856, quoting *Meade v. State Collection Agency Board* (1960) 181 Cal.App.2d 774, 776 and *West Coast Co. v. Contractors' Board* (1945) 72 Cal.App.2d 287, 301-302.

any appreciable risk of harm to the health, safety or welfare of patients who may receive respiratory care treatment from him. The revocation of Mr. Brown's license required by the requirements of section 3752.7 cannot be characterized as a just and reasonable resolution of this matter. Mr. Brown is strongly encouraged to continue his excellent rehabilitation program, stay clean and sober, and apply for reinstatement at the earliest possible time.

13. Business and Professions Code section 3753.1 provides:

(a) An administrative disciplinary decision imposing terms of probation may include, among other things, a requirement that the licensee-probationer pay the monetary costs associated with monitoring the probation.

(b) The board shall not renew or reinstate the license of any licensee who has failed to pay all of the costs ordered under this section once a licensee has served his or her term of probation.

14. The Board may request the Administrative Law Judge to direct a licensee found to have committed a violation or violations of the licensing act to pay a sum not to exceed the reasonable costs of the investigation and enforcement of the case under Business and Professions Code section 3753.5.

15. Business and Professions Code section 3753.7 provides:

For purposes of this chapter, costs of prosecution shall include attorney general or other prosecuting attorney fees, expert witness fees, and other administrative, filing, and service fees. As set forth the Factual Findings, the reasonable costs of investigation and enforcement in this matter are \$1300.00.

16. *Zuckerman v. Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, requires the consideration of the following factors in determining the amount of costs to be assessed:

- The board must not assess the full costs of investigation and prosecution when to do so will unfairly penalize a licensee who has committed some misconduct, but who has used the hearing process to obtain dismissal of other charges or a reduction in the severity of the discipline imposed.
- The board must consider the licensee's subjective good faith belief in the merits of his or her position.
- The board must consider whether the licensee has raised a colorable challenge to the proposed discipline.

- Furthermore, as in cost recoupment schemes in which the government seeks to recover from criminal defendants the cost of their state-provided legal representation, the board must determine that the licensee will be financially able to make later payments.
- Finally, the board may not assess the full costs of investigation and prosecution when it has conducted a disproportionately large investigation to prove that a licensee engaged in relatively innocuous misconduct.

17. The *Zuckerman* factors were carefully considered in this matter. The Board prevailed on all allegations. Mr. Brown is suffering from significant health problems and can only work a very limited number of hours. He is living in a clean and sober house. His means are very limited. The statutorily required revocation of his license will deprive him of the ability to earn income in his profession. There is substantial evidence that recovery of costs claimed by the Board would create a financial hardship. The Board shall consider staying all or part of the costs assessment of \$1300.00 as a result of financial hardship.

ORDER

Respiratory Care Practitioner License number 9108, issued by the Respiratory Care Board to Eric Clifton Brown, is REVOKED.

Mr. Brown shall pay to the Board a sum not to exceed the costs of the investigation and prosecution of this case. That sum shall not exceed \$1,300, and shall be paid in full directly to the Board on terms to be determined by the Board. If Respondent is unable to pay the costs in a timely fashion, he shall be required to submit an explanation of why he is unable to submit these costs in part or in entirety, and the date(s) he will be able to submit the costs including payment amount(s). Supporting documentation and evidence of why the Respondent is unable to make such payment(s) must accompany this submission. The Board shall consider staying the costs obligation, temporarily or permanently, upon a further showing of financial hardship by Mr. Brown. The costs obligation must be either stayed or satisfied in full before the license is fully reinstated. If the license is reinstated on a probationary basis, payment of any unsatisfied and unstayed costs obligation shall be part of the probationary terms and conditions.

DATED: _____

STEPHEN J. SMITH
Administrative Law Judge
Office of Administrative Hearings